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The Underappreciated Tactic of Impeachment by Contradiction

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Trials unfold one witness at a time. So it is easy to get stuck in a witness-by-witness mentality. Too often, lawyers limit themselves to testimony or evidence that originated from the witness on the stand, ignoring other available material.

That is particularly true when impeaching a witness on cross-examination. Of course, some forms of impeachment, like impeachment by a prior inconsistent statement, are limited to statements by the witness.

But impeachment by contradiction—impeaching by offering contrary extrinsic evidence—is not so limited. And when used judiciously, impeachment by contradiction can simultaneously undermine the witness’s (and opposing party’s) credibility while building your own and emphasizing important substantive evidence.

The Basics

The Federal Rules of Evidence nowhere mention impeachment by contradiction. But the common law has long recognized that lawyers may impeach a witness by confronting the witness with extrinsic evidence contradicting that testimony. And Rule 607 at least implicitly codifies that common-law practice by broadly authorizing any party to “attack the witness’s credibility.” Unlike other modes of impeachment, however, the impeachment material here *does* rely on the truth of that material. As a result, the material must be admissible under other rules such as the rule against hearsay.

To prevent trivial inconsistencies from bogging down a trial, the common law prohibited impeachment by contradiction on so-called collateral matters—those that are relevant only because they contradict the witness’s testimony. But sometimes, seemingly minor facts are deemed non-collateral because they are “linchpin” facts, meaning that the thrust of the witness’s entire testimony could not be true if he or she were mistaken about that fact.

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The upshot is that lawyers can impeach by contradiction if: (1) a witness testifies contrary to evidence or other testimony; (2) the testimony is on a non-collateral matter; and (3) the impeaching material is otherwise admissible.

An Example

Abraham Lincoln [taught](#) future generations of trial lawyers how to impeach by contradiction in an 1858 murder trial. The prosecution's star witness claimed that he saw the killing under the light of a full moon. After getting the witness to repeat his testimony, Lincoln impeached the witness using an almanac showing that, at the time of the murder, there was only a quarter moon below the horizon. The drama of that moment won a full acquittal for Lincoln's client.

That is textbook impeachment by contradiction. The almanac contradicted the testimony on a non-collateral matter (identification of the defendant), and it was independently admissible through judicial notice and Rule 803(17)'s hearsay exception for certain commercial publications.

The Benefits

As Lincoln's example illustrates, impeachment by contradiction packs a greater punch than other modes of impeachment. It not only undermines the witness's credibility but also establishes substantive evidence for use in summation. And unlike, for example, impeachment by prior inconsistent statement, impeachment by contradiction suggests that opposing counsel was sloppy in not identifying readily available external facts, casting doubt on the other side's entire presentation. When done strategically, it can also supply a memorable moment that sticks in jurors' minds as they deliberate.